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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY MARTINEZ,

Defendant and Appellant.

B301265

(Los Angeles County
Super. Ct. No. BA470991)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed as modified.

Alice Tavoukjian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A jury convicted Danny Martinez of resisting an executive officer in violation of Penal Code section 69.¹ Martinez appealed the judgment, and his appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We modify the judgment to correct several sentencing errors, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2018, Los Angeles Police Department detective Moses Castillo was in a patrol car, stopped at a red light near a Carl's Jr. restaurant. A man approached the car and told the detective there was a person with a gun inside the restaurant. Detective Castillo radioed for backup.

Around 20 uniformed police officers responded to the call, and they began evacuating the restaurant. The officers soon encountered Martinez, who was standing in a narrow hallway that led to a back area of the restaurant. At the time, the officers believed the suspect was somewhere in the back of the restaurant, behind Martinez. The officers could also see several people with their hands up standing in the back area, but they could not get to them because Martinez was blocking their way.

Police officers told Martinez there was a man with a gun in the restaurant, and they repeatedly asked him to exit the restaurant. One of the officers told Martinez he was not a suspect and they just wanted him to come outside. Martinez responded, "Fuck you, you asshole. You think I'm stupid?" Martinez later said, "come inside, you fucking chicken shit."

When the verbal requests were unsuccessful, an officer warned Martinez he would be shot with a beanbag if he did not comply with the orders. Martinez continued to refuse to exit the

¹ All undesignated section references are to the Penal Code.

restaurant, and two officers entered the hallway and grabbed him by his forearms. Martinez forcefully resisted as the officers tried to get his hands behind his back. A third officer grabbed one of Martinez's legs and helped force him to the ground. Martinez continued to resist efforts to handcuff him, even after two officers used tasers on him multiple times. When the officers eventually handcuffed Martinez, he began kicking his feet at them. The officers secured Martinez's legs in a hobble and pulled him out of the building.

Martinez was charged by information with one count of resisting an executive officer in violation of section 69. Prior to trial, he filed a motion for discovery of the personnel records of several responding police officers for any complaints related to the use of excessive force. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) The trial court conducted an in camera review of the officers' personnel files, and ordered that certain records be disclosed to the defense, subject to a protective order.

At trial, the prosecution presented testimony from several responding police officers as well as video recordings taken from their body cameras, all of which was generally consistent with the facts summarized above. In addition, the prosecution presented testimony from Sadiel Roman, who was working as the restaurant manager on the day of the incident. According to Roman, prior to trial, he was interviewed by a defense investigator and recounted witnessing events generally consistent with the events summarized above. Sometime after the interview, Martinez went to the restaurant while Roman was working. Martinez told Roman there was "big money" he would share with him, which Roman understood to be referring to a potential lawsuit against the city. Roman responded that he

would go to court if necessary, and he would say the same thing he said to the defense investigator and the police. A few months later, Martinez returned to the restaurant and offered to pay Roman \$100 if he went to court, to compensate him for his lost wages.

Martinez testified in his own defense. According to Martinez, he, his cousin, and his work colleague were standing outside the restaurant when an employee opened a door and hit his cousin on the shoulder. Martinez told the employee to be careful. A man and woman who were walking by thought Martinez was harassing the employee and told him to stop. The dispute escalated, and the woman threw a milkshake at Martinez's cousin and colleague. After the confrontation ended, Martinez, his cousin, and his associate went inside the restaurant to clean up.

A few minutes later, Martinez heard a police officer say, "Get the fuck out, motherfucker, or we're going to effing shoot." Martinez suspected the police were there because of the milkshake incident. He raised his hands and told the officers he did not want to go outside because he felt safer inside the restaurant, where there were security cameras. The police officers entered the restaurant and used the taser on Martinez before they made other physical contact with him. An officer then grabbed Martinez's leg and forced him to the ground. The officers punched and kicked Martinez, and pushed down on him with their body weight, which made it difficult to breathe. As a result of the incident, Martinez suffered numerous injuries, including to his arms, back, and neck.

Martinez admitted telling Roman there was a possibility he would have a lawsuit against the police officers and the city, but

he denied offering Roman any money from that lawsuit. He was not trying to influence Roman's testimony; he simply wanted him to appear and testify that the restaurant had security cameras.

The jury convicted Martinez as charged. At sentencing, the trial court denied probation and selected the high term of three years in county jail. The court further remarked that Martinez "is required to pay a restitution fine pursuant to Penal Code section 1202.4(b) through (e), which is not imposed and stayed until an ability to pay hearing." The court did not orally impose any other fines, fees, or assessments.

Martinez timely appealed.

DISCUSSION

We appointed counsel to represent Martinez on appeal. Appointed counsel filed an opening brief pursuant to *Wende, supra*, 25 Cal.3d 436, requesting independent review of the record on appeal for arguable issues. Counsel specifically asks us to review the in camera hearing related to Martinez's *Pitchess* motion. We notified Martinez by letter that he could submit any claim, argument, or issue that he wished our court to review. Martinez declined to do so.

During our independent review of the record, we discovered the trial court's oral pronouncements at sentencing are not accurately reflected in the sentencing minute order and abstract of judgment. The reporter's transcript of the sentencing hearing shows the court did not specify the amount of the restitution fine; nor did it impose any other fines or assessments. The sentencing minute order, however, reflects that the court imposed a \$400 restitution fine, and the abstract of judgment indicates the court imposed a \$400 restitution fine (§ 1202.4, subd. (b)), a suspended \$300 parole revocation restitution fine (§ 1202.45), a \$40 court

operations assessment (§ 1465.8), and a \$30 conviction assessment (Gov. Code, § 70373).

“In a criminal case, it is the oral pronouncement of sentence that constitutes the judgment.” (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) “Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

Here, the trial court erred in failing to orally specify the amount of the restitution fine. Although we could remand the matter for the trial court to correct this error, it is a better use of judicial resources to instead modify the judgment to impose the minimum fine of \$300. (See *People v. Diaz* (1991) 229 Cal.App.3d 1310, 1316 (*Diaz*) [imposing minimum restitution fine where trial court failed to specify the amount, because remanding the matter would be “judicially uneconomical”]; *People v. Blankenship* (1989) 213 Cal.App.3d 992, 1000, fn. 10 [same]; see also *People v. Walker* (1991) 54 Cal.3d 1013, 1029 overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177 [citing *Diaz* with approval].)

The court also erred in failing to impose a \$40 court operations assessment (§ 1465.8) and \$30 conviction assessment (Gov. Code, § 70373), both of which are mandatory. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272.) Because these errors resulted in an unauthorized sentence, we may correct them for the first time on appeal. (See *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530 [“Because the seven additional assessments, surcharge, and penalties are mandatory, their

omission may be corrected for the first time on appeal.”].)

Accordingly, we modify the judgment to impose the assessments.²

Additionally, the abstract of judgment includes two other errors that must be corrected. First, it incorrectly indicates the trial court imposed a section 1202.45 parole revocation restitution fine. The court did not orally impose the fine, which would have been unauthorized. (See *People v. Butler* (2016) 243 Cal.App.4th 1346 [a trial court may not impose a section 1202.45 fine on a defendant sentenced to a full term of custody in county jail for a violation of section 69].) Second, the abstract of judgment incorrectly indicates Martinez was convicted by plea; he was convicted by jury.

Our independent review did not identify any other arguable issues. Per counsel’s request, we have reviewed the record of the in camera hearing related to Martinez’s *Pitchess* motion. We conclude the trial court properly conducted the hearing, describing the nature of all complaints, if any, against the relevant officers. Further, we find the court did not abuse its discretion in ruling discoverable evidence existed and needed to

² We acknowledge that the court in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) stayed the execution of assessments imposed under section 1465.8 and Government Code section 70373 until the People proved the defendant had the ability to pay them. Because this case lacks the exceptional circumstances present in *Dueñas*, we decline to apply its reasoning to stay the assessments here. (See *People v. Caceres* (2019) 39 Cal.App.5th 917, 926–927 [“Although we do not reach whether *Dueñas* was correctly decided as to those extreme facts, in our view, the due process analysis in *Dueñas* does not justify extending its holding beyond those facts.”].)

be disclosed. The record does not show that additional information should have been disclosed.

DISPOSITION

The judgment is modified to specify the section 1202.4, subdivision (b) restitution fine is \$300. It is further modified to impose a \$40 court operations assessment (§ 1465.8) and \$30 conviction assessment (Gov. Code, § 70373). The trial court is directed to prepare a corrected abstract of judgment, consistent with these modifications. The corrected abstract of judgment shall also indicate Martinez was convicted by jury, rather than by plea, and the trial court did not impose a section 1202.45 fine. The trial court shall forward a certified copy of the corrected abstract of judgment to the county jail. As modified, the judgment is affirmed.

BIGELOW, P. J.

We Concur:

STRATTON, J.

WILEY, J.